

## **ADMINISTRATIVE APPEAL DECISION**

**CONTINENTAL 127 FUND LLC; FILE NO. 200200333**

### **CHICAGO DISTRICT**

**NOVEMBER 8, 2002**

**Review Officer:** James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division, Dallas, Texas

**Appellant Representatives:** Ms Sheila H. Deely, Gardner, Carton & Douglas; Kurt Krall, Julia Eveker, Jeanne Stewart, Continental Properties; Marshall Eames, EquiPoise, Inc.; Graig Knoche, Steve Kudwa, Knoche Engineering, P.C.; Tom Huddleston, Huddleston-McBride Co.

**Chicago District Representatives:** Karon M. Marzec, Project Manager, Keith L. Wozniak, Chief, West Section

**Permit Authority:** Section 404 of the Clean Water Act (33 U.S.C. 1344).

**Receipt of Request For Appeal (RFA):** 25 July 2002

**Appeal Conference/Site Visit Date:** 24 September 2002

**Background Information:** The 72-acre site is located north of US Route 30, south of the Metra Commuter Railroad's Rock Island District line and east of the Norfolk & Southern Railroad in the Village of New Lenox, Will County, Illinois. In a letter dated 23 January 2002, the appellant's consultant EquiPoise, Inc., confirmed a 6 February 2002 pre-application meeting with the Chicago District (the district). The pre-application meeting was held to discuss EquiPoise's preliminary assessment of the property, the appellant's proposed project, the information the district required to complete its jurisdiction determination (JD) for the project site, and the criteria the district uses to determine if a wetland is isolated. Continental Properties agreed to provide the district with all required information to complete a JD.

The district regulatory staff performed a site visit on 15 March 2002. By letter dated 19 March 2002, the district informed EquiPoise that the subject property contained "waters of the United States" that were subject to the Corps jurisdiction under Section 404 of the Clean Water Act. The district's site visit and approved JD were completed before the appellant's consultant completed its evaluation of the property and before the appellant submitted a request for a JD.

EquiPoise submitted a written request for a JD to the district on 16 May 2002, and provided the district with recent site photographs, aerial photographs, National Wetland Inventory (NWI) map, a Flood Insurance Rate Map, U.S. Geological Survey (USGS) Quad map and results of drainage and tile studies. A U.S. Department of Agriculture Natural Resources Conservation Service (USDA NRCS) wetland conservation determination was also provided to the district.

District personnel performed a second site visit on 23 May 2002, and issued a second approved JD on 16 July 2002. The district again determined that the property contained “waters of the United States”. By a letter dated July 24, 2002, the appellant appealed this determination to the Division office.

The appellant’s appeal is based “on deficiencies in the Chicago District’s review and Jurisdictional determination.” Continental Properties claims that (1) Wetland B does not meet the “standard for adjacency”; (2) that there is no evidence to support an historic stream connection between Wetland B and Hickory Creek and (3) that there is no current hydrologic connection between Wetland B and Hickory Creek.

**Summary of Decision:** Appeal reasons one, two and three are similar and are found to have merit. The district’s administrative record does not adequately address these issues. The district shall reconsider its JD decision as appropriate and include sufficient documentation to support its JD.

**Appeal Decision and Instructions to the Chicago District Engineer (DE):**

**Appeal Reason 1:** “As an initial matter, Continental disputes that the Chicago District is applying the proper standard to determine whether a wetland is jurisdictional. Following *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, a wetland must be adjacent to a navigable water in order to be subject to federal jurisdiction.”

**FINDING:** This appeal reason has merit.

**ACTION:** The district’s administrative record does not adequately address this issue. The district shall reconsider its JD decision as appropriate and include sufficient documentation to support its JD.

**DISCUSSION:** The appellant feels that the standard to identify a wetland as “adjacent” has not been met for this action. Continental contends that the “wetland at issue does not border or neighbor a navigable water or its tributary, nor is it contiguous to a navigable water or its tributary. In fact, Wetland B is not in the floodplain, nor is it adjacent to the floodplain.”

The appellant’s representation of the holding in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) is erroneous and creates an implication that was clearly not articulated or intended by the Court. The Supreme Court in *SWANCC* narrowly confined its ruling to invalidating that portion of the Corps’ regulations pertaining to an assertion of CWA jurisdiction based on the so called “Migratory Bird Rule.” In its opinion, the Court specifically declined to interfere with the holding in *United States v. Riverside-Bayview Homes, Inc.*, 474 U.S. 121 (1985). Thus, *Riverside-Bayview* continues to support the Corps’ assertion of CWA jurisdiction over, *inter alia*, all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters. *Riverside-Bayview* also continues to support the Corps’ regulation of wetlands “adjacent” to waters of the United States, defined at 33 CFR 328.3(c) as bordering, contiguous or

neighboring, and wetlands that are part of a tributary system to navigable waters of the United States. Regulatory jurisdiction over “waters of the United States” under the Clean Water Act (CWA) is not confined to areas comprising “navigable waters” under the Rivers and Harbors Act of 1899.

Since the *SWANCC* decision, several courts have rejected the appellant’s broad interpretation of that ruling. In *United States v. Interstate General Co.*, 152 F.Supp. 2d 843 (D. Md. June 12, 2001), the Court stated that [T]he *SWANCC* case is a narrow holding in that only 33 CFR 328.3(a)(3)...is invalid pursuant to a lack of congressional intent...Because the Supreme Court only reviewed 33 CFR 328.3(a)(3), it would be improper for this Court to extend the *SWANCC* Court’s ruling any farther than they clearly intended (*Id.* At 847). The Fourth Circuit upheld the District Court’s decision in the *Interstate General* case in an unpublished opinion dated July 2, 2002. In *U.S. v. Krilich*, 152 F. Supp. 2d 983 (N.D.Ill., June 21, 2001), the Court stated that “cases subsequent to *SWANCC* have not limited the definition of waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters (*Id.* At 992). In *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D.Cal., December 28, 2001), the Court stated that [T]he *SWANCC* Court did not invalidate other Corps interpretations (i.e. non-Migratory Bird Rule interpretations) of navigable waters, including all traditional navigable waters, all interstate waters, all tributaries to navigable or interstate waters, all wetlands adjacent to any and all of such waters, and all waters that are subject to the ebb and flow of the tide (*Id.* At 1055). In *U.S. v. Lamplight Equestrian Center, Inc.*, the Court concluded that *SWANCC* did not limit Corps jurisdiction under the Act to navigable waters and wetlands adjacent to navigable waters (2002 WL 360652 (N.D.Ill. March 8, 2002)).

Based on the file documentation of the district’s two site visits, the district did follow the correct standard to determine adjacency of Wetland B as articulated by the courts and as promulgated in the Corps regulations in 33 CFR 328.3(a)(5) and 328.3(a)(7). The district concluded that the area identified as Wetland B has a tributary to an interstate water flowing through it and that Wetland B is adjacent to this tributary. The record shows that the project manager observed evidence of surface flows that showed pathways through the site, including observable flows through Wetland B.

While the district’s conclusion is consistent with existing Corps regulations and current law, the conclusion is not supported by the documented administrative record. As is discussed more fully for appeal reasons 2 and 3, the record does not support the district’s conclusion that Wetland B had an historic stream connection or that there is a tributary from Wetland B to Hickory Creek. Therefore, I cannot conclude that the district’s administrative record leads to a reasoned conclusion that Wetland B is adjacent to a tributary of a navigable water. Therefore, this reason for appeal has merit.

**Appeal Reason 2:** “Historic Stream Connection. After the first unsolicited Jurisdictional Determination by the District, Continental requested the basis for the claim that there was a “historic stream connection”. The district provided one map. This map was a 1901 Des Plaines, Illinois quadrangle map. The District presumes that this map, which is over 100-years old, shows a connection between Wetland B and Hickory Creek. Continental Properties had already reviewed a plethora of historical mapping, which Continental submitted with it supplementary

information, and no other evidence supported a historic stream connection. The district has completely ignored all of this other information”; and

**Appeal Reason 3:** “Current Hydrologic Connection. Continental believes that the crux of the inquiry is whether there is a current hydrologic connection between Wetland B and a navigable water of the U.S. or a tributary to a navigable water. There is no hydrologic connection.”

**Finding:** These reasons for appeal have merit.

**Action:** The district’s administrative record does not adequately address this issue. The district shall reconsider its JD decision as appropriate and include sufficient documentation to support its JD.

**Discussion:** The response to appeal reasons 2 and 3 is similar and is combined for convenience. The appellant believes the district did not fully use the information made available by the appellant, and therefore could not support its finding that there is a connection between Wetland B and Hickory Creek. Thus, the adequacy of the supporting documentation for the district’s JD is at issue here. In its determination letters to the appellant, the district stated, “Wetland B had a historic stream connection that is/was conveyed through a pipe, an agricultural drain tile with surface inlets and outlets. Conveyance of the waters in this fashion maintains Clean Water Act jurisdiction.” To support its findings that Wetland B is a tributary stream to Hickory Creek, the Project Manager reviewed the NWI map, USGS Hydrologic Atlas, USDA Soil Survey for Will County, a 1956 Will County Drainage Map, a 1901 Des Plaines, Illinois quadrangle map and conducted two site visits.

The 1901 Des Plaines, Illinois 15’ Quadrangle does indicate that two intermittent streams are located within the project site. The 1956 Will County Drainage Map also indicates the existence of several intermittent streams in the project area. However, these maps do not use a scale accurate enough to determine the locations of these streams. The 1929 Mokena Quadrangle does not depict the intermittent streams in the same location. A review of the 1981 NWI Mokena Quadrangle indicates wetlands being located only in the area identified as Wetland C. These wetlands are identified as PEMA and PEMIC. PEMA identifies the wetlands as being Palustrine Emergent Wetland Temporarily Flooded. The “IC” designation indicates the wetlands are seasonally flooded. The 1993 USGS Mokena Quadrangle and the USGS Hydrologic Atlas #204 Mokena Quadrangle show two intermittent streams converging in the location of Wetland C. The maps also indicate the existence of a stream that flows into the area identified as Wetland A. Several other quadrangle maps contained in the administrative record also support the existence of the streams in Wetland A and Wetland C but not Wetland B.

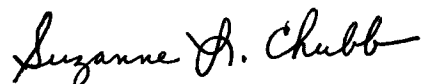
During the appeal site visit, the Review Officer (RO) observed that a storm water drain outlet is located at the “head” of Wetland B. This outlet drains water from Illinois State Highway 30 and from a residential area located south of the site. There is no evidence in the record to support the district’s findings that Wetland B is or was a tributary of Hickory Creek. Aerial photographs of the area located south of the site do not indicate the existence of a natural or a channelized stream in the area. In the decision document, the district stated that water flowed during heavy

precipitation events. This coincides with the location of the storm water drain outlet being located at the south end of Wetland B.

The district's administrative record is also inconsistent with regard to its assertion of an historic overland flow. While the district asserts that there is, and was, an overland flow, the district does not clearly articulate how this happens. Further, the district decision document indicates that the absence of a defined channel, which would be present with overland flow, is caused by cultivation. Review of the USDA farming records, which include aerial photographs, indicated the project site has been in agricultural production since the early 1900s and that the drain tile system was installed in approximately the 1920's or 1930's. Based on the RO's conversation with Mr. Robert Jankowski of the NRCS, agricultural drain tile systems are used to remove subsurface water and not to convey stream flow. The appellant's tile study appears to verify Mr. Jankowski's statement. From the information contained in the tile study map, no drain tile fields exist in Wetland C. As previously discussed, Wetland C appears to be a tributary stream of Hickory Creek. Wetland B has a drain tile system, which started to fail in the 1970's. Due to the failure of the tile system, storm water runoff is conveyed by overland flow. Wetland A also contains a failed tile system. However, this system serves the existing building site located on the property and is not used to drain a stream. Unlike Wetland B where the tile system runs through the middle of the wetland, the tile system located in Wetland A appears to run on the east side of the wetland. In addition, the photos reveal that the entire site was in agricultural production until the tile system starting failing in the early 1970's. During this time period woody vegetation started to appear on the photos of the site. The NRCS labeled these areas as "wetland" in its wetland determination. These "wetland" areas coincide with the areas labeled Wetland A, B and C in the appellant's wetland determination. The rest of the site received a "non-wetland" or "prior converted cropland" label, which are not waters of the United States.

**CONCLUSION:** For the reasons stated above, I find that the appellant's reasons for appeal have merit.

FOR THE COMMANDER:



SUZANNE L. CHUBB  
Regulatory Program Manager  
Great Lakes & Ohio River Division